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3 UNITED STATES DISTRICT COURT  
4 DISTRICT OF OREGON  
5 PORTLAND DIVISION  
6

7 THELMA ANN FAILEY, )  
8 Plaintiff, ) No. 03:11-cv-01088-HU  
9 vs. )  
10 PATRICK R. DONAHOE, Postmaster )  
General; SHARON BLACKBURN, )  
11 Facilities Manager; and UNITED )  
STATES POSTAL SERVICE; )  
12 Defendants. )  
13

**MEMORANDUM OPINION AND ORDER  
ON MOTION TO DISMISS, OR IN  
THE ALTERNATIVE FOR SUMMARY  
JUDGMENT**

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1 HUBEL, Magistrate Judge:

2       The plaintiff Thelma Ann Failey brings this discrimination  
3 action against her former employer United States Postal Service  
4 ("USPS"); Patrick R. Donahoe, who is United States Postmaster  
5 General; and Sharon Blackburn, who was the Facilities Manager at  
6 the USPS's Mount Hood Detached Distribution Center ("DDC") in  
7 Portland, Oregon, during a portion of the time Failey worked at the  
8 DCC. Failey claims she was "forced into 'early retirement' . . .  
9 because of the color of her skin, her age, and her disability[,]  
10 . . . and because she had the courage to complain of prior  
11 discrimination." Dkt. #18, Second Amended Complaint, ¶¶ 1, 16.  
12 The matter currently before the court is the defendants' "Motion to  
13 Dismiss and in the Alternative for Summary Judgment." Dkt. #31;  
14 see Dkt. ## 32, 33, 37, & 38. Failey has opposed the motion, Dkt.  
15 ## 34 & 35, and the court heard oral argument on the motion on  
16 February 7, 2013. The motion is fully briefed and ripe for  
17 decision.

### 18 19 ***I. BACKGROUND FACTS***

20       Failey worked at the DDC as a Mail Processing Clerk for nearly  
21 ten years. She had some health problems during that time that are  
22 only documented sparsely in the record before the court. She  
23 suffered a back injury on August 30, 2000, which resulted in some  
24 type of temporary modified duty restrictions through January 23,  
25 2001.<sup>1</sup> In June 2003, Jane O. Drummond, M.D., who was treating  
26 Failey for "chronic cervical radiculopathy," indicated Failey's

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28 <sup>1</sup> See Dkt. #33-1, ECF pp. 49-50 - Kaiser Permanente Workers' Compensation Forms dated 1/2/01 and 1/23/01.

1 work on "the FSM 100 sorting machine" was exacerbating her  
 2 symptoms, and Failey should be restricted to working on the machine  
 3 for "four hours with two hour breaks in between."<sup>2</sup>

4 Failey apparently suffered "neck and rotator cuff injuries in  
 5 2004,"<sup>3</sup> which resulted in some type of work restrictions. Doctor's  
 6 notes from July 2008, indicate Failey was assigned permanent modi-  
 7 fied duty restrictions as of May 29, 2007, that included no  
 8 repetitive lifting over 15 to 20 pounds, no work at or above right  
 9 shoulder level, and avoid work on "the AFMS 100 mail processing  
 10 machine," although she was authorized to "push and pull up to 15-  
 11 20# of force (not including cart or equipment weight) on wheels,  
 12 etc."<sup>4</sup>

13 Failey was authorized to be off work from February 28, 2008,  
 14 through March 27, 2008, for surgery to remove a mass in her lower  
 15 left quadrant.<sup>5</sup> She was seen in the ER on July 13, 2008, for an  
 16 apparent neck injury, and was authorized to be off work through  
 17 July 15, 2008. Upon her return, she was to be restricted to "no  
 18 lifting more than 5 lbs., pushing, pulling, work at shoulder level  
 19 or above [and] work requiring repeated or quick head movements for  
 20 up to 2 weeks."<sup>6</sup> Failey saw a doctor at Kaiser Permanente on  
 21 July 18, 2008, to assert a new claim for workers' compensation  
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23 <sup>2</sup>*Id.*, ECF p. 51, Letter from Dr. Drummond dated June 12, 2003.

24 <sup>3</sup>Dkt. #32, ECF p. 7.

25 <sup>4</sup>Dkt. #33-1, ECF p. 55, Kaiser Permanente Workers' Compensa-  
 26 tion Form dated 7/18/08; Dkt. #18, Second Amended Complaint, ¶ 17.

27 <sup>5</sup>*Id.*, ECF p. 52, Clinician's Report of Disability dated  
 1/28/2008.

28 <sup>6</sup>*Id.*, ECF pp. 52-54

1 benefits due to "sprain or strain of cervical spine."<sup>7</sup> The  
 2 workers' compensation form indicates a greater than 50% chance that  
 3 Failey's injury was the "[r]esult of industrial exposure."<sup>8</sup> She  
 4 was released for modified work consistent with her existing  
 5 restrictions through August 8, 2008.<sup>9</sup> At a doctor's visit on  
 6 August 12, 2008, her work restrictions were noted to be permanent.<sup>10</sup>

7 In addition to these injuries, Failey is diabetic, requiring  
 8 the use of insulin.<sup>11</sup>

9 At the time Blackburn came to the DDC, Failey was working on  
 10 "Tour 2," a shift that went from 9:00 a.m. to 5:30 p.m. She had  
 11 been working that shift as "a limited duty employee . . . for about  
 12 7 years."<sup>12</sup> Blackburn's interactions with Failey took place between  
 13 January and September 2008.<sup>13</sup> Blackburn does not hire and fire  
 14 employees; her job is "to run the postal service in an efficient  
 15 manner," which includes changing employees' shifts, and "[p]utting  
 16 people where the need is, where the volume is."<sup>14</sup> Blackburn  
 17 observed that "a lot of employees on tour 2 day shift" - the shift  
 18 when Failey was working - "were going home every day because there  
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20 <sup>7</sup>*Id.*, ECF p. 55.

21 <sup>8</sup>*Id.* The form further indicated Failey had had a previous  
 22 workers' compensation claim dated April 1, 2004.

23 <sup>9</sup>*Id.*

24 <sup>10</sup>*Id.*, ECF p. 57.

25 <sup>11</sup>Dkt. #32, ECF p. 7.

26 <sup>12</sup>Dkt. #38-1, Failey's "Pre-Complaint," ECF pp. 1-2.

27 <sup>13</sup>Dkt. #35-1, Blackburn Depo., ECF p. 10.

28 <sup>14</sup>*Id.*

1 was no mail volume, and yet on swing shift around 8:00 [p.m.],” she  
 2 was having to bring people in before their shift and pay a lot of  
 3 overtime because of the higher mail volume.<sup>15</sup> As a result,  
 4 Blackburn made the business decision to “excess, meaning get rid of  
 5 jobs,” the Tour 2 flat sorter crew, moving those employees to  
 6 different shifts.<sup>16</sup> On July 25, 2008, Blackburn told Failey that  
 7 she was going to be moved to Tour 3.<sup>17</sup> Soon thereafter, Blackburn  
 8 gave letters to all of the employees whose shifts were going to be  
 9 changed, and also had a “stand-up talk” with them regarding the  
 10 upcoming change.<sup>18</sup> Failey received a letter dated August 8, 2008,  
 11 advising her “that as a junior employee,” she was “excess to the  
 12 needs of the section,” and her position was “no longer a necessary  
 13 position based on the needs of the service due to the decrease in  
 14 mail volume.” The letter further stated that as of September 13,  
 15 2008, Failey’s job schedule would be “1600 to 0030 with Schedule  
 16 Days off on Sunday and Monday.”<sup>19</sup>

17 In the Pre-Complaint Failey submitted to the USPS Equal  
 18 Employment Opportunity office (the “EEO”), she indicated she and  
 19 Blackburn had had discussions previously about moving Failey to  
 20 Tour 3, and Failey had told Blackburn that due to her health

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 22 <sup>15</sup>*Id.*, ECF p. 11.

23 <sup>16</sup>*Id.*, ECF p. 10.

24 <sup>17</sup>Dkt. #38-1, Failey’s “Pre-Complaint,” ECF p. 1.

25 <sup>18</sup>Dkt. #35-1, Blackburn Depo., ECF p. 10; see Dkt. #33-1, ECF  
 26 p. 72.

27 <sup>19</sup>Dkt. #33-1, ECF p. 72; see *id.*, p. 73 (indicating “As  
 28 unassigned and because of no mail available in the morning shift  
 and half of the clerks on shift 2 are being changed either their  
 job is being abolished or being reposted.”).

1 problems - specifically, the scheduling of her insulin injections -  
 2 she would not be "able to cope physically on tour 3."<sup>20</sup> Failey  
 3 asked for an accommodation to allow her to stay on Tour 2.<sup>21</sup> On  
 4 August 13, 2008, the USPS referred Failey to the District  
 5 Reasonable Accommodation Committee (the "DRAC"). The six-person  
 6 DRAC met on August 21, 2008, to discuss Failey's request for  
 7 accommodation. As part of their discussion, the DRAC talked with  
 8 Failey by telephone. The DRAC recognized Failey's current medical  
 9 restrictions, and found that none of her current restrictions  
 10 related to the hours of work. The DRAC further found Failey's  
 11 diabetes did not affect any of her major life activities. Failey's  
 12 request for accommodation was denied.<sup>22</sup>

13 Blackburn offered Failey a work schedule from 12:00 p.m. to  
 14 8:30 p.m., with the option of taking leave from 5:30 p.m. to  
 15 8:30 p.m. if Failey felt unable to complete the entire shift.<sup>23</sup>  
 16 Blackburn communicated this offer twice to an EEO representative,  
 17 but Failey turned down the offer both times.<sup>24</sup>

18 Failey declined to accept the change from Tour 2 to Tour 3,  
 19 instead taking disability retirement effective as of December 15,  
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 21  
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23 <sup>20</sup>Dkt. #38-1, Failey's "Pre-Complaint," ECF p. 1.

24 <sup>21</sup>*Id.*; Dkt. #33-1, DRAC Information Evaluation Form, ECF p. 75.

25 <sup>22</sup>Dkt. #33-1, ECF pp. 73-87.

26 <sup>23</sup>*Id.*, ECF p. 38, EEO Investigative Affidavit of Sharon F.  
 27 Blackburn.

28 <sup>24</sup>*Id.*

1 2008. Her last day in pay status with the USPS was September 28,  
2 2008.<sup>25</sup>

3 On October 22, 2008, Failey filed an "EEO Complaint of  
4 Discrimination in the Postal Service."<sup>26</sup> She claimed discrimination  
5 on the basis of Race ("African American"), Age ("60 yrs"), and  
6 Disability ("neck, back, shoulder").<sup>27</sup> Failey described the nature  
7 of her discrimination claim as follows:

8 Ms. Failey was involved in an on the job  
9 injury in August of 2000. As a result, she  
10 suffered back injuries and therefore was put  
11 on light duty. She was involved in another on  
12 the job injury in 2003 in which she sustained  
13 injuries to her neck. Finally, she suffered a  
14 shoulder injury from an on the job accident in  
15 2004. All of the accidents required  
16 Ms. Failey to remain on light duty. During  
17 her employment she made attempts to bid for  
18 certain jobs, specifically of a supervisor  
19 nature. Although she passed all the required  
20 tests, she was told that she should not bid  
21 for those jobs because of her light duty  
22 status, although she otherwise qualified.

23 Once Ms. Failey was finally given an oppor-  
24 tunity to enter the supervisor training  
25 program, she was treated differently than the  
26 others in the program. She was micro-managed  
27 and over-evaluated during the program. She  
28 was criticized for not performing certain  
actions, in which others in the program were  
not criticized for [sic]. After the program  
was over Ms. Failey alleged age, race and  
disability discrimination.

The discrimination that occurred was not a  
single event, but was continuous action. Each  
time Ms. Failey was denied a chance to apply  
for a supervisor position she was being  
discriminated against because of her race, age

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25 <sup>25</sup>*Id.*, ECF p. 166, Notification of Personnel Action; see *id.*,  
26 ECF p. 145, Final Agency Decision.

27 <sup>26</sup>*Id.*, ECF pp. 189-90.

28 <sup>27</sup>*Id.*, ECF p. 189.

1 and disability. She was treated differently  
 2 because of her race. She was treated differ-  
 3 ently because she is 60 years old. On a  
 4 number of occasions she was encouraged to seek  
 5 early retirement by Sharon Blackburn. Fur-  
 6 ther, she was discriminated against because of  
 7 her physical disabilities. One of the reasons  
 8 she was denied in applying for a supervisor  
 9 position was because she was on a light duty  
 as a result of her disabilities.

10 In August of 2008 Ms. Failey requested accom-  
 11 modations for her disability, the request  
 12 being heard by the Accommodation Committee.  
 13 Ms. Failey was interviewed by phone and ulti-  
 14 mately her accommodation was denied. She did  
 15 not appeal the decision.

16 Further, in July of 2008 she was notified that  
 17 her day shift position was being excessed and  
 18 that she would be required to work a new shift  
 19 from 1600 to 0030. The letter encouraged  
 20 employees to bid for other vacancies on other  
 21 shifts. Again, because of Ms. Failey's light  
 22 duty status, she was not able to bid for other  
 23 jobs. Others who were moved shifts were on  
 24 machines, not on light duty as was Ms. Failey.  
 25 No other light duty employees were moved in  
 26 the process. Her physician's [sic] have  
 27 stated that due to her injuries and physical  
 28 disabilities, she is not able to work any  
 other shift but the day shift.<sup>28</sup>

18 The National EEO Investigative Services Office of the USPS  
 19 grouped Failey's narrative into five specific issues, as follows:

20 [Failey] alleges discrimination based on Race  
 21 (African American), Age (60 years old), and  
 22 Physical Disability (Neck, Back, and Shoulder)  
 when:

- 23 1) Since in or around 2003, [she] was not  
 permitted to bid on certain jobs, specifically  
 of a supervisor nature;
- 24 2) While in the supervisor training program,  
 [she] was treated differently than others in  
 25 that she was over-evaluated, micro-managed,  
 and criticized;
- 26 3) On a number of occasions, [she] was encour-  
 27 aged to seek early retirement;

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28 <sup>28</sup>*Id.*, ECF p. 190.



1 4) In July 2008, [she] was notified that her  
 2 light duty assignment was changed from Tour 2  
 3 to Tour 3 effective September 13, 2008; and  
 4 5) On August 22, 2008, [her] accommodation  
 request to the District Reasonable Accommo-  
 dation Committee (DRAC) to remain on Tour 2  
 was denied.<sup>29</sup>

5 The EEO only accepted issues (4) and (5) for investigation. Issues  
 6 (1), (2), and (3) were dismissed "in accordance with 29 C.F.R.  
 7 1614.107(a) (2)," because Failey had failed to bring those issues to  
 8 the attention of an EEO counselor, and those issues did not "add to  
 9 []or clarify the original complaint and could have reasonably been  
 10 expected to grow out of the original complaint."<sup>30</sup>

11 Failey acknowledged that issues (1) and (2) were dismissed  
 12 rightfully, but she argued the third issue was "related to issues  
 13 4 and 5, which were accepted."<sup>31</sup> Failey argued one of the times  
 14 "she was encouraged to seek early retirement" was after she  
 15 expressed concerns regarding the change in shift from Tour 2 to  
 16 Tour 3, and therefore, issue (3) was directly related to issues (4)  
 17 and (5).<sup>32</sup> In response, the EEO maintained its position, stating,  
 18 "We do not find that this issue states a distinct and actionable  
 19 claim; however, it may be cited as background information in  
 20 support of the issues accepted for investigation."<sup>33</sup>

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23 <sup>29</sup>*Id.*, ECF p. 196, "Partial Acceptance/Partial Dismissal of  
 24 Formal EEO Complaint."

25 <sup>30</sup>*Id.*, ECF p. 197.

26 <sup>31</sup>*Id.*, ECF p. 195, letter dated November 21, 2008, from  
 Failey's attorney to the EEO Manager.

27 <sup>32</sup>*Id.*

28 <sup>33</sup>*Id.*, ECF p. 194.

1 The EEO issued its final decision on Failey's complaint on  
 2 June 23, 2009.<sup>34</sup> The EEO noted that to establish a *prima facie* case  
 3 of race and age discrimination, Failey had to show that she "(1)  
 4 belongs to a protected class; (2) was subjected to an adverse  
 5 employment action; and (3) was treated differently in this regard  
 6 than similarly situated individuals who were not members of the  
 7 protected group."<sup>35</sup> The Agency found Failey had established the  
 8 first prong, in that she is African American and was born in 1948,  
 9 and she arguably had established the second prong.<sup>36</sup> With regard  
 10 to the third prong, however, the Agency found Failey "failed to  
 11 identify any employee, not in her protected groups, who was treated  
 12 more favorably than her, and [she] acknowledged that she was the  
 13 only light or limited duty employee on Tour 2."<sup>37</sup> The Agency noted  
 14 "Blackburn testified that she exceeded a whole crew of AFSM Tour 2  
 15 employees to Tour 3 . . . consist[ing] of six Mail Processing  
 16 Clerks and five Mail handlers."<sup>38</sup> The Agency further found that  
 17 with regard to her age discrimination claim, Failey failed to show  
 18 anything beyond her own speculation that the decision to excess her  
 19 to Tour 3 was motivated by her age.<sup>39</sup> The Agency concluded Failey

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21 <sup>34</sup>*Id.*, ECF pp. 136-56, Final Agency Decision.

22 <sup>35</sup>*Id.*, ECF p. 145 (citing *Mayberry v. Vought Aircraft Co.*, 55  
 23 F.3d 1086, 1090 (5th Cir. 1995)).

24 <sup>36</sup>*Id.*

25 <sup>37</sup>*Id.*, ECF p. 146.

26 <sup>38</sup>*Id.*

27 <sup>39</sup>*Id.*, ECF pp. 146-47 (citing, *inter alia*, *Reeves v. Sanderson*  
 28 *Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 2105,  
 147 L. Ed. 2d 105 (2000)).

1 had "failed to establish a *prima facie* case of discrimination based  
2 upon race or age."<sup>40</sup>

3 Turning to Failey's claim of disability discrimination, the  
4 EEO found Failey failed to establish a *prima facie* case because she  
5 had not shown she was an "otherwise qualified individual with a  
6 disability" for purposes of the Rehabilitation Act.<sup>41</sup> Even if  
7 Failey had shown she was an "otherwise qualified individual with a  
8 disability," she had not shown the USPS "failed to make a needed  
9 reasonable accommodation, resulting in adverse treatment of her."<sup>42</sup>

10 And even if Failey had shown the USPS failed to accommodate her  
11 disability, she had failed to show "she was treated differently  
12 than individuals not within her protected group."<sup>43</sup>

13 The EEO further found that even if Failey had established a  
14 *prima facie* case of discrimination based on race, age or  
15 disability, the USPS management had "articulated a legitimate, non-  
16 discriminatory explanation for their actions."<sup>44</sup> Specifically, the  
17 EEO noted Blackburn had exsessed an entire crew of AFSM employees  
18 from Tour 2 to Tour 3, and each of those employees had been dealt

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20 <sup>40</sup>*Id.*, ECF p. 147.

21 <sup>41</sup>*Id.*, ECF p. 147 (noting "EEOC Regulation 29 C.F.R. 1630.2(g)  
22 defines a person with a disability as one who: (i) has a physical  
23 or mental impairment which substantially limits one or more of such  
24 person's major life activities; (ii) has a record of having such an  
25 impairment; or (iii) is regarded as having such an impairment.");  
26 see *id.*, ECF pp. 147-51.

27 <sup>42</sup>*Id.*

28 <sup>43</sup>*Id.*, ECF p. 150; see *id.*, ECF pp. 147-51.

<sup>44</sup>*Id.*, ECF p. 151; see *id.*, ECF pp. 137-38 (discussing the  
burden-shifting framework of *McConnell Douglas Corp. v. Green*, 411  
U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its  
progeny).

1 with in a similar manner; i.e., by delivery of a letter explaining  
 2 the situation, and with a "stand-up" talk during which Blackburn  
 3 explained her decision. In addition, Blackburn "explained that  
 4 according to the [collective bargaining agreement], full time  
 5 employees, excess to the needs of a section, starting with that  
 6 employee who [was] junior in the same craft or occupational group  
 7 and in the same level assigned in that section, [would] be  
 8 reassigned outside the section but within the same craft or  
 9 occupation group."<sup>45</sup> According to Blackburn, Failey was "the most  
 10 junior of the six clerks that were excessed," and "had a bid  
 11 position in the AFSM unit."<sup>46</sup> Blackburn stated Failey "was still  
 12 in the same occupational group and in the same level as the other  
 13 AFSM Mail Processing Clerks that were being excessed, despite  
 14 Failey's limited duty."<sup>47</sup> The Agency further found Failey had not  
 15 met her burden to show that management's stated reason was "not  
 16 only a pretext, but [a] pretext for discrimination."<sup>48</sup>

17 The Agency concluded that Failey had failed to establish  
 18 discrimination as alleged, and her complaint was "closed with a  
 19 finding of no discrimination."<sup>49</sup>

20 On July 18, 2009, Failey appealed the Agency's action to the  
 21 U.S. Equal Employment Opportunity Commission ("EEOC").<sup>50</sup> Failey

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 23 <sup>45</sup>*Id.*, ECF p. 152.

24 <sup>46</sup>*Id.*

25 <sup>47</sup>*Id.*

26 <sup>48</sup>*Id.*, ECF pp. 153-54.

27 <sup>49</sup>*Id.*, ECF p. 154.

28 <sup>50</sup>*See id.*, ECF pp. 104-11.

1 contended she was "an individual with a disability under the  
 2 Rehabilitation Act"; she had "been unable to control her diabetes  
 3 for several years"; "all of her medical documentation was not  
 4 submitted to the DRAC"; "the Facility Manager told her to retire  
 5 because of her medical limitations"; and "the Facility Manager made  
 6 her work on the AFSM machine 100, which violated her medical  
 7 restrictions."<sup>51</sup> On June 10, 2011, the EEOC issued its decision  
 8 affirming the Agency's final decision.<sup>52</sup>

9 Failey filed the instant case on September 8, 2011.<sup>53</sup> After  
 10 proceeding through the initial review process and receiving court-  
 11 appointed counsel, Failey filed her Second Amended Complaint on  
 12 January 23, 2012.<sup>54</sup> It is her Second Amended Complaint that is the  
 13 subject of the defendants' current motion.

14 In her Second Amended Complaint, Failey asserts the following  
 15 claims for relief:

16 **First Claim for Relief** (Unlawful Employment Practices) (42  
 17 U.S.C. § 2000e):

18 **Count I** (Discrimination Based on Skin Color) (42 U.S.C.  
 19 § 2000e-2(a)) - for allegedly requiring Failey "to work on the  
 20 flat sorter machine and giving her excessive work loads";  
 21 "failing to compensate her while she was in physical therapy";  
 22 "requiring her to work weekends"; "limiting her work hours  
 23  
 24

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25 <sup>51</sup>*Id.*, ECF p. 106.

26 <sup>52</sup>*Id.*, ECF p. 108; see *id.*, ECF pp. 104-08.

27 <sup>53</sup>Dkt. #2, Complaint.

28 <sup>54</sup>Dkt. #18.

1 arbitrarily"; and "creat[ing] a hostile work environment that  
2 ultimately led to her forced 'early retirement.'" <sup>55</sup>

3 **Count II** (Discriminatory Retaliation) (42 U.S.C. § 2000e-3(a))  
4 - for allegedly "creating a hostile work environment, because  
5 [Failey] opposed Defendants' unlawful employment practices  
6 through a prior lawsuit and various grievances"; and, from  
7 2004 until 2008, "requiring her to work weekends and limiting  
8 her work hours arbitrarily, because she opposed Defendants'  
9 unlawful employment practices through a prior lawsuit and  
10 various grievances." <sup>56</sup>

11 **Second Claim for Relief** (Unlawful Age Discrimination) (29  
12 U.S.C. § 623):

13 **Count I** (Discrimination Based on Age) (29 U.S.C. § 623(a)) -  
14 for allegedly "attempting to force [Failey] into quitting by  
15 giving her excessive work loads"; and "limit[ing] her work  
16 hours arbitrarily," from 2004 until 2008. <sup>57</sup>

17 **Count II** (Discriminatory Retaliation) (29 U.S.C. § 623(d)) -  
18 for allegedly "creating a hostile work environment, because  
19 [Failey] opposed Defendants' age discrimination through a  
20 prior lawsuit and various grievances"; and "requiring her to  
21 work weekends and limiting her work hours arbitrarily, because  
22 she opposed Defendants' age discrimination through a prior  
23 lawsuit and various grievances." <sup>58</sup>

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25 <sup>55</sup> *Id.*, ¶¶ 43-47.

26 <sup>56</sup> *Id.*, ¶¶ 49 & 50.

27 <sup>57</sup> *Id.*, ¶¶ 53 & 54.

28 <sup>58</sup> *Id.*, ¶¶ 56 & 57.

1       **Third Claim for Relief** (Unlawful Discrimination Based on  
 2 Disability) (42 U.S.C. § 12112) - for allegedly attempting to force  
 3 Failey to quit her job, "telling her 'why don't you just retire[,]'  
 4 and by giving her excessive work loads"; and "admitting to her that  
 5 her transfer request would be unsuccessful because of her  
 6 disability and misleading her about the elimination of her current  
 7 position."<sup>59</sup>

8       **Fourth Claim for Relief** (Oregon Unlawful Employment Discrimi-  
 9 nation Law) (ORS 659A.030) - relying on her previous allegations in  
 10 the pleading).<sup>60</sup>

11       **Fifth Claim for Relief** (Oregon Unlawful Employment Discrimina-  
 12 tion Against Injured Workers Law) (ORS 659A.040) - relying on her  
 13 previous allegations in the pleading.<sup>61</sup>

14       **Sixth Claim for Relief** (Oregon Unlawful Employment Discrimina-  
 15 tion Against Persons with Disabilities Law) (ORS 659A.112) - rely-  
 16 ing on her previous allegations in the pleading.<sup>62</sup>

## 17 18                   **II. THE DEFENDANTS' MOTION TO DISMISS**

### 19                               **A. Standards**

20       Chief Judge Aiken of this court set forth the standard for the  
 21 court's consideration of a motion to dismiss in *Gambie v.*  
 22 *Cornelius*, No. 10-CV-6265-AA, 2011 WL 1311782 (D. Or. Apr. 1, 2011)  
 23 (Aiken, C.J.). Judge Aiken observed:

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25       <sup>59</sup>*Id.*, ¶¶ 60 & 61.

26       <sup>60</sup>*Id.*, ¶ 64.

27       <sup>61</sup>*Id.*, ¶ 66.

28       <sup>62</sup>*Id.*, ¶ 68.

Under Fed. R. Civ. P. 12(b)(6), a complaint is construed in favor of the plaintiff, and its factual allegations are taken as true. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). "[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563[, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929] (2007). "[G]enerally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint." *Daniels-Hall*, 629 F.3d at 998.

*Id.* at \*2.

"As a general matter, a district court may not consider any material outside of the pleadings when ruling on a Rule 12(b)(6) motion." *O'Connell-Babcock v. Multnomah County, Oregon*, No. 08-cv-459-AC, slip op., 2009 WL 1139441 at \*4 (D. Or. Apr. 24, 2009) (King, J.) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). However, the Ninth Circuit recognizes an exception to this rule that allows consideration of documents "'whose contents are alleged in a [pleading] and whose authenticity no party questions, but which are not physically attached to the . . . pleading.'" *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)), *superseded by statute on other grounds as recognized in* *Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 681 (9th Cir.



2006); *Vanguard Prods. Group v. Merchandising Technologies, Inc.*, slip op., 2008 WL 939041, at \*3 (D. Or. Apr. 3, 2008) (Brown, J.) (same; quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)).

Although Failey does not mention her EEO complaints expressly in her Complaint, the "contents" of her EEO complaints are fairly alleged in her Complaint. The defendants clearly do not question the authenticity of the documents contained in the EEOC investigatory file because they have submitted those documents, themselves, for the court's consideration. The court finds the contents of Failey's EEO complaints are documents of the type contemplated by the Ninth Circuit in crafting the exception discussed by the *Parrino* court, and therefore will consider those documents in the context of the defendants' motion to dismiss.

#### **B. Exhaustion of Remedies**

The defendants argue some of Failey's claims should be dismissed because she failed to exhaust her administrative remedies with regard to those claims.<sup>63</sup> Specifically, the defendants argue Failey has failed to exhaust her administrative remedies with regard to her Second Claim for Relief, Count I, where Failey alleges age discrimination due to the defendants' "attempting to force her into quitting by giving her excessive workloads, because of her age"; and that portion of her Third Claim for Relief where Failey alleges disability discrimination due to the defendants' "attempting to force her into quitting, telling her 'why don't you

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<sup>63</sup>Dkt. #32, ECF pp. 12-15.

1 just retire[,]’ and by giving her excessive work loads[.]” The  
2 defendants argue these claims relate to issue (3) of Failey’s EEO  
3 complaint, which the EEO dismissed for failure to raise the issue  
4 before the EEO counselor.<sup>64</sup>

5 The defendants further argue Failey has raised new claims in  
6 the instant case that have never been exhausted. These include  
7 Failey’s First Claim for Relief, Counts I and II (discrimination  
8 based on skin color and a retaliation claim under Title VII), and  
9 her Second Claim for Relief, Count II (discriminatory retaliation  
10 based on age).<sup>65</sup>

11 To establish federal subject matter jurisdiction, Failey “was  
12 required to exhaust her EEOC administrative remedies before seeking  
13 federal adjudication of her claims.” *EEOC v. Farmer Bros. Co.*, 31  
14 F.3d 891, 899 (9th Cir. 1994) (citation omitted). To determine  
15 whether Failey exhausted her administrative remedies, the court  
16 looks both to the scope of the EEO charge, and to the investigation  
17 of the charge. *Id.* The court has subject matter jurisdiction over  
18 Failey’s Title VII claims if those claims “fell within the scope of  
19 the EEOC’s *actual* investigation or an ‘EEOC investigation which *can*  
20 *reasonably be expected* to grow out of the charge of  
21 discrimination.’” *Id.* (quoting *Sosa v. Hiraoka*, 920 F.2d 1451,  
22 1456 (9th Cir. 1990)).

23 Notably, “[t]he EEOC’s failure to address a claim asserted by  
24 the plaintiff in her charge has no bearing on whether the plaintiff  
25 has exhausted her administrative remedies with regard to that

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27 <sup>64</sup>See Dkt. #33-1, ECF p. 197.

28 <sup>65</sup>Dkt. #32, ECF pp. 15-17.

claim." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002) (citing *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1480 (9th Cir. 1997)). The *B.K.B.* court observed that the language of a claimant's EEOC charges is construed "with utmost liberality since [the charges] are made by those unschooled in the technicalities of formal pleading." *B.K.B.*, 276 F.3d at 1100 (citing, *inter alia*, *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S. Ct. 616, 619, 30 L. Ed. 2d 679 (1972) "(stating that 'technicalities are particularly inappropriate in a statutory scheme [such as Title VII] in which laymen, unassisted by trained lawyers, initiate the process')"). "[T]he crucial element of a charge of discrimination is the factual statement contained therein." *Id.* (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970); additional citation omitted). The court may consider allegations not specified in a claimant's administrative charge if those claims are like, or reasonably related to, the claims set forth in the administrative charge. *Id.* (citations omitted).

In Failey's Pre-Complaint, she alleged only disability discrimination.<sup>66</sup> In the EEO Investigative Affidavit (Complaint), it is noted that Failey had "alleged discrimination based on Race (African American), Age (60 years old), and Physical Disability (Neck, Back, and Shoulder)[.]"<sup>67</sup> Even a generous reading of Failey's EEO complaints reveals nothing that could be construed as an allegation that her employer retaliated against her or discriminated against her because of prior grievances or lawsuits

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<sup>66</sup>See Dkt. #38-1, Pre-Complaint.

<sup>67</sup>Dkt. #35-3, ECF p. 2; see *id.*, ECF pp. 3-10, 12-13.

1 Failey had filed. Similarly, Failey did not mention, in her EEO  
2 complaint, anything about the defendants "failing to compensate her  
3 while she was in physical therapy, because of the color of her  
4 skin," as alleged in her First Claim for Relief, Count I, paragraph  
5 44. Thus, the court finds Failey did not exhaust her administra-  
6 tive remedies with regard to her claims of discriminatory retalia-  
7 tion in her First Claim for Relief, Count II, and her Second Claim  
8 for Relief, Count II, and her claim of race discrimination on the  
9 basis of failure to pay her while she was in physical therapy. The  
10 defendants' motion to dismiss is **granted** as to those claims,  
11 consisting specifically of paragraphs 44, 48-51, and 55-58 of  
12 Failey's Second Amended Complaint.

13 With regard to Failey's claims of discrimination on the basis  
14 of "skin color," the defendants argue Failey never raised such  
15 claims in her EEO complaints. The EEOC recognized that Failey had  
16 raised a discrimination claim based on "race."<sup>68</sup> Under the facts  
17 of this case, the defendants' attempt to draw a distinction between  
18 Failey's claim of discrimination based on "race," in her EEOC  
19 complaint, and her claim of discrimination based on "skin color,"  
20 in her Complaint, ignores the broad reach of anti-discrimination  
21 statutes. See *El-Hakem v. BJO Inc.*, 415 F.3d 1068, 1072-73 (9th  
22 Cir. 2005) (same, with regard to the reach of 42 U.S.C. § 1981);  
23 *cf. Hernandez v. New York*, 500 U.S. 352, 354, 111 S. Ct. 1859,  
24 1863, 114 L. Ed. 2d 395 (1991) (observing, in the context of  
25 classes of individuals who may be excluded from jury service, "It  
26 may be, for certain ethnic groups and in some communities, that

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27  
28 <sup>68</sup>*Id.*

1 proficiency in a particular language, like skin color, should be  
 2 treated as a surrogate for race under an equal protection  
 3 analysis.""). A fair reading of Failey's Complaint indicates she  
 4 intended to assert a claim for discrimination on the basis of race,  
 5 as she did before the EEOC. The court will make such an assumption  
 6 for purposes of the defendants' motion, and if Failey's First Claim  
 7 for Relief, Count I, survives, then Failey will be afforded an  
 8 opportunity to amend her Complaint to properly allege race  
 9 discrimination.

10 Thus, assuming Failey's First Claim for Relief, Count I,  
 11 properly states a claim for race discrimination, the court finds  
 12 Failey exhausted her administrative remedies as to her First Claim  
 13 for Relief, Count I, paragraphs 42, 43, and 45-47; her Second Claim  
 14 for Relief, Count I, paragraphs 52-54; and her Third Claim for  
 15 Relief, paragraphs 59-62. In these claims, Failey alleges the  
 16 defendants discriminated against her by, among other things,  
 17 "requiring her to work on the flat sorter machine and giving her  
 18 excessive work loads,"<sup>69</sup> "requiring her to work weekends,"<sup>70</sup>  
 19 "limiting her work hours arbitrarily,"<sup>71</sup> forcing her into early  
 20 retirement,<sup>72</sup> and telling her a "transfer request would be  
 21 unsuccessful because of her disability and misleading her about the  
 22 elimination of her current position."<sup>73</sup> These are not "new claims,"

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23  
 24 <sup>69</sup>Dkt. #18, ¶¶ 43 & 60.

25 <sup>70</sup>*Id.*, ¶¶ 45 & 53.

26 <sup>71</sup>*Id.*, ¶¶ 46 & 54.

27 <sup>72</sup>*Id.*, ¶¶ 47, 53, & 60.

28 <sup>73</sup>*Id.*, ¶ 61.

1 as argued by the defendants, as the facts underlying these claims  
 2 were described by Failey (albeit not always clearly) in her EEO  
 3 complaint documents.

4 The defendants' motion to dismiss these claims for failure to  
 5 exhaust is **denied**.

### 7 C. Failey's ADA Claim

8 Failey brings her Third Claim for Relief ("Unlawful  
 9 Discrimination Based on Disability" under the Americans With  
 10 Disabilities Act ("ADA"), 42 U.S.C. § 12112.<sup>74</sup> The defendants argue  
 11 an ADA claim cannot lie against the federal government. Failey  
 12 does not address this issue in her response to the defendants'  
 13 motion.<sup>75</sup>

14 The defendants are correct. As the Honorable Michael R. Hogan  
 15 of this court recently explained:

16 It is well-settled that the federal government  
 17 is excluded from the ADA's definition of  
 18 "employer." 42 U.S.C. § 12111(5)(B)(i) [foot-  
 19 note omitted]. Based on this exclusion,  
 20 federal courts have concluded that the ADA  
 21 provides no remedy to federal employees."  
 22 *Daniels v. Chertoff*, 2007 WL 1140401, \*2 (D.  
 23 Ariz. 2007) (citing *Calero-Cerezo v. U.S.*  
 24 *Dep't of Justice*, 355 F.3d 6, 11, n.1 (the ADA  
 25 is not available to federal employees); see  
 26 also *Henrickson v. Potter*, 327 F.3d 444, 447  
 27 (5th Cir. 2003) (the entire federal government  
 28 is excluded from coverage of the ADA); accord  
*Rivera v. Heyman*, 157 F.3d 101, 103 (2nd Cir.  
 1998) (a federal employee has no remedy for  
 employment discrimination under the ADA).

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26 <sup>74</sup>Dkt. #18, ¶¶ 59-62; see also *id.*, ¶ 4, jurisdictional allega-  
 27 tion for ADA claim.

28 <sup>75</sup>See Dkt. #34.

1 *Thomas v. Astrue*, slip op., 2012 WL 5198339, at \*4 (D. Or. Oct. 17,  
2 2012) (Hogan, J).

3 Accordingly, the defendants' motion to dismiss is **granted** as  
4 to Failey's Third Claim for Relief.

#### 5 6 **D. State Law Claims**

7 The defendants argue the court lacks jurisdiction over  
8 Failey's state-law claims - her Fourth, Fifth, and Sixth Claims for  
9 Relief.

##### 10 11 **1. Fourth Claim for Relief**

12 Failey's Fourth Claim for Relief asserts a claim under ORS  
13 659A.030, which prohibits discrimination on the basis of "race,  
14 color, religion, sex, sexual orientation, national origin, marital  
15 status or age." Section 717 of Title VII of the Civil Rights Act  
16 provides the exclusive remedy by which a federal employee can  
17 challenge discriminatory employment practices "based on race,  
18 color, religion, sex, or national origin." 42 U.S.C. § 2000e-16;  
19 see *Charles v. Garrett*, 12 F.3d 870, 873 (9th Cir. 1993) (citing,  
20 *inter alia*, *Brown v. General Servs. Admin.*, 425 U.S. 820, 96 S. Ct.  
21 1961, 48 1. Ed. 2d 402 (1976)). The statute is expressly  
22 applicable to employees of the USPS. 42 U.S.C. § 2000e-16.

23 Similarly, the Ninth Circuit, in agreement with every other  
24 federal circuit to have considered the issue, has held that the  
25 federal Age Discrimination in Employment Act, 29 U.S.C. § 621 et  
26 seq., "is the exclusive remedy for age discrimination claims by  
27 federal employees." *Ahlmeier v. Nevada Sys. of Higher Educ.*, 555  
28

1 F.3d 1051, 1057 & n.5 (2009); see *Ahlmeier*, *passim* (discussing the  
2 issue in detail).

3 Thus, Failey's Fourth Claim for Relief is precluded by federal  
4 law, and the defendants' motion to dismiss her Fourth Claim for  
5 Relief is **granted**.

## 6 7 **2. Fifth Claim for Relief**

8 Failey brings her Fifth Claim for Relief under ORS § 659A.040,  
9 which provides:

10 It is an unlawful employment practice for an  
11 employer to discriminate against a worker with  
12 respect to hire or tenure or any term or con-  
13 dition of employment because the worker has  
14 applied for benefits or invoked or utilized  
the procedures provided for in ORS chapter 656  
or has given testimony under the provisions of  
those laws.

15 ORS § 659A.040(1). To make out a *prima facie* case under the  
16 statute, Failey must show that "(1) [s]he invoked the workers'  
17 compensation system; (2) [s]he was discriminated against in the  
18 tenure, terms or conditions of [her] employment; and (3) the  
19 discrimination was caused by [her] invocation of workers' compen-  
20 sation." *Krouse v. Ply Gem Pacific Windows Corp.*, 803 F. Supp. 2d  
21 1220, 1226 (D. Or. 2011) (Haggerty, J) (citing *Williams v.*  
22 *Freightliner, LLC*, 196 Or. App. 83, 90, 100 P.3d 1117, 1121  
23 (2004)).

24 Failey has made no allegations whatsoever relating to any  
25 workers' compensation claim. Moreover, the Federal Employees  
26 Compensation Act ("FECA"), 5 U.S.C. § 8101, *et seq.*, "is a federal  
27 workers' compensation scheme intended to provide an exclusive  
28 remedy for work-related injuries to federal employees." *Ponce v.*



1 *U.S. Government*, slip op., 2012 WL 292210, at \*2 (D. Or. Jan. 31,  
 2 2012) (Acosta, MJ) (citing 5 U.S.C. §§ 8102(a), 8116(c)); see  
 3 *O'Connell v. Potter*, 274 Fed. Appx. 518, 519 (9th Cir. 2008) (mem.)  
 4 ("To the extent that [plaintiff's] injuries were job-related,  
 5 FECA's remedy is exclusive.").

6 Accordingly, the defendants' motion to dismiss Failey's Fifth  
 7 Claim for Relief is **granted**.

### 8 9 **3. Sixth Claim for Relief**

10 In her Sixth Claim for Relief, Failey alleges the defendants  
 11 violated ORS § 659A.112, which prohibits an employer from refusing  
 12 "to hire, employ or promote, to bar or discharge from employment or  
 13 to discriminate in compensation or in terms, condition or privi-  
 14 leges of employment on the basis of disability." ORS  
 15 § 659A.112(1). Failey contends she was discriminated against on  
 16 the basis of her "disability."

17 The federal Rehabilitation Act of 1973, 29 U.S.C. § 791 *et*  
 18 *seq.*, is the exclusive remedy for federal employees alleging disa-  
 19 bility discrimination. *Thomas v. Astrue*, slip op., 2012 WL 5198339  
 20 at \*3 (D. Or. Oct. 17, 2012) (Hogan, J.); see *Oakes v. Sec'y, U.S.*  
 21 *Dept. of Veteran's Affairs*, slip op., 2012 WL 4508000 at \*8 (D. Or.  
 22 Sept. 28, 2012) (Hernandez, J.) (citations omitted)). Therefore,  
 23 the defendants' motion to dismiss Failey's Sixth Claim for Relief  
 24 also is **granted**.

25 As to all of her state-law claims for relief, Failey argues  
 26 the federal statutes cited above "only preclude state law if the  
 27 federal statute is designed to remedy the same harm." Dkt. #7,  
 28 p. 7 (citing *Brown v. General Services Admin.*, 425 U.S. 820, 829-

35, 96 S. Ct. 1961, 1967-69, 48 L. Ed. 2d 402 (1976); *Sommatino v. United States*, 255 F.3d 704, 711 (9th Cir. 2001)). Failey misapprehends the holdings in these cases. The *Sommatino* court explained that the federal anti-discrimination statutes do not preclude a companion claim for "highly personal violations beyond workplace discrimination," such as sexual assault or physical violence. *Sommatino*, 255 F.3d at 712. Failey has made no such allegations here, nor has she asserted any state-law tort claims. The Oregon statutes upon which Failey bases her Fourth, Fifth, and Sixth Claims are specifically precluded by federal law, as discussed above.

#### ***E. Proper Parties Defendant***

The defendants argue Sharon Blackburn and the United States Postal Service should be dismissed from the case, asserting the only proper party defendant in an employment discrimination action against the USPS is the Postmaster General.<sup>76</sup> Failey agrees the Postmaster General is the only proper defendant as to her Title VII claims, but she argues, without citation to any authority, that "other federal discrimination protection laws and the Oregon state discrimination protection laws" allow the naming of other defendants.<sup>77</sup>

The court has dismissed all of Failey's claims except her Title VII claim for race discrimination, and her claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 629,

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<sup>76</sup>Dkt. #32, ECF p. 18.

<sup>77</sup>Dkt. #34, p. 8.

1 633a. As noted above, Failey does not deny that the Postmaster  
2 General is the only proper defendant for purposes of her Title VII  
3 claim.

4 With regard to Failey's ADEA claim, the Ninth Circuit Court of  
5 Appeals has long held "that 42 U.S.C. § 2000e-16(c), identifying  
6 the proper defendant in Title VII discrimination actions, also  
7 applies to age discrimination claims brought under the ADEA."  
8 *Romain v. Shear*, 799 F.2d 1416, 1418 (9th Cir. 1986). Therefore,  
9 the defendants' motion to dismiss Sharon Blackburn and the United  
10 States Postal Service as defendants in this case is **granted**.

### 11 12 **III. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

13 For the reasons discussed above, all of Failey's claims have  
14 been dismissed except (1) her First Claim for Relief, Count I,  
15 paragraphs 42, 43, 45, 46, and 47, to the extent she alleges  
16 discrimination based on race; and (2) her Second Claim for Relief,  
17 Count I, paragraphs 52, 53, and 54, alleging discrimination based  
18 on her age.

19 The defendants have only argued for summary judgment as to the  
20 age discrimination claim. The court therefore addresses the  
21 defendants' motion for *partial* summary judgment against Failey's  
22 age discrimination claim contained in her Second Claim for Relief,  
23 Count I, paragraphs 52, 53, and 54.

### A. Standards

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In considering a motion for summary judgment, the court "must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial." *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002) (citing *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996)).

The moving party initially bears the burden of proving the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. *Id.* at 325, 106 S. Ct. 2548. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Id.* at 324, 106 S. Ct. 2548. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 528 (1986). In fact, the non-moving party must come forth with evidence from which a jury could reasonably render a verdict in the non-moving party's favor. *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505. In determining whether a jury could reasonably

render a verdict in the non-moving party's favor, all justifiable inferences are to be drawn in its favor. *Id.* at 255, 106 S. Ct. 2505.

*In re Oracle Corp. Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010).

Notably, "[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. Univ. of Calif. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). The *Chuang* court explained that this minimal evidence standard is due to the nature of employment cases, where "the ultimate question is one that can only be resolved through a searching inquiry - one that is most appropriately conducted by a factfinder, upon a full record." *Id.* (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)).

#### **B. Failey's Age Discrimination Claim**

The Ninth Circuit has explained the standard of review for an ADEA claim as follows:

We evaluate ADEA claims that are based on circumstantial evidence of discrimination by using the three-stage burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *Enlow v. Salern-Keizer Yellow Cab Co.*, 489 F.2d 802, 812 (9th Cir. 2004). Under this framework, the employee must first establish a prima facie case of age discrimination. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000). If the employee has justified a presumption of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse employment action. *Id.* If the employer satisfies that burden, the employee must then prove that the reason

advanced by the employer constitutes mere pre-text for unlawful discrimination. *Id.* "As a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000).

*Diaz v. Eagle Produce Ltd. Partnership*, 521 F.3d 1201, 1207 (9th Cir. 2008); accord *Brockbank v. U.S. Bancorp.*, slip op., 2013 WL 311326, at \*1 (9th Cir. Jan. 28, 2013) (mem.).

With regard to Failey's claim that she was "forced to retire" in violation of the ADEA, she "must show that she was: '(1) at least forty years old, (2) performing [her] job satisfactorily, (3) discharged, and (4) either replaced by [a] substantially younger employee[] with equal or inferior qualifications or discharged under circumstances otherwise "giving rise to an inference of age discrimination.'" *Brockbank, supra* (quoting *Diaz*, 521 F.3d at 1207; citation omitted). With regard to her disparate treatment allegations, she must show that her age "'actually played a role in [the employer's decisionmaking] process and [her age] had a determinative influence on the outcome.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141, 120 S. Ct. 2097, 2105, 147 L. Ed. 2d 105 (2000) (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706, 123 L. Ed. 2d 338 (1993)).

Failey does not allege, and the evidence does not indicate, that she was replaced by a substantially younger employee. Failey alleges she was treated differently because of her age when (1) she was forced into quitting because she was given "excessive work

loads," and (2) her hours were limited arbitrarily.<sup>78</sup> The evidence fails even to suggest that these actions, if they occurred, were due to Failey's age. Three other "junior Mail Processing Clerks with restrictions were also excessed from Tour 2."<sup>79</sup> All three of them were over the age of 40 (ages 57, 42, and 53). Failey has offered nothing other than her own speculation that age played a part in her employer's actions.

Even accepting all of Failey's allegations as true for purposes of the defendants' summary judgment motion, Failey still cannot prevail because the USPS had legitimate, nondiscriminatory reasons for its actions. Failey was not singled out for transfer from Tour 2 to Tour 3; an entire crew was excessed to Tour 3, with transfers based on seniority in accordance with the collective bargaining agreement between the USPS and the American Postal Workers Union. Failey was the least senior of the employees being excessed, and the other three clerks with similar jobs all were over age 40. The record contains no evidence to substantiate Failey's claim that she was given "excessive work loads." Failey has offered no evidence to suggest the stated reasons for the USPS's actions were pretextual, nor has she established that she was "forced" into early retirement.

The court finds, therefore, that Failey has failed to show the existence of any genuine issue for trial on her age discrimination claim. Accordingly, the defendants' motion for partial summary judgment on this claim is **granted**.

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<sup>78</sup>Dkt. #18, ¶¶ 53 & 54.

<sup>79</sup>Dkt. #33-1, ECF p. 151.

1 **IV. CONCLUSION**

2 The only issue remaining in the case is Failey's First Claim  
3 for Relief, Count I, alleging race discrimination. As discussed  
4 above, Failey has inartfully pled this claim as one asserting  
5 discrimination on the basis of "skin color." Failey is directed to  
6 file a Third Amended Complaint **by April 12, 2013**, to properly  
7 restate her claim for race discrimination against the Postmaster  
8 General only, and omitting all other claims.

9 IT IS SO ORDERED.

10 Dated this 26th day of March, 2013.

11  
12 /s/ Dennis J. Hubel

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14 Dennis James Hubel  
15 Unites States Magistrate Judge  
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